In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 685

STATE OF WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on the first trial (R. 17–24; Pet. App. A, 21–31) is reported *sub nom. United States* v. *Gas and Oil Development Co.*, 126 F. Supp. 840. The opinion of the court of appeals on the first appeal (Pet. App. B, 31–44) is reported at 233 F. 2d 811. On remand, the district court wrote no opinion; its findings of fact and conclusions of law are set out at R. 48–51. The opinion of the court of appeals on the second appeal (R. 127–132; Pet. App. C, 45–53) is reported at 294 F. 2d 830.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1961. On November 22, 1961, Mr. Justice Douglas extended the time for filing a peti-

tion for a writ of certiorari to and including January 29, 1962. The petition for a writ of certiorari was filed on January 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal or state law determines the boundary between tideland owned by the State of Washington and littoral upland which was owned by the United States or its grantee at the time of admission of the State to the Union when there has been accretion to the shore.

2. Whether, regardless of whether federal or state law governs the ownership of the accretion, the "ordinary high-water line" dividing tideland from littoral upland is a line marked on the ground by the action of the water, or is a line at the average elevation of high tide over one complete tidal cycle of 18.6 years.

STATEMENT

The facts are undisputed. The United States owns two lots on the shore of the Pacific Ocean in Washington. In 1900 Samson Johns, an Indian homesteader, was given a fee simple patent for the two lots. In 1916, the fee patent was voided as contrary to law and a trust patent was issued in its place. The United States now holds the lots in trust under the 1916 patent for the heirs of Samson Johns. At all times until patented to Samson Johns, the lots were part of the public domain of the United States (R. 48–50). Since 1858, the ordinary high-water mark in front of the lots has moved gradually seaward due to imperceptible accretion (R. 50). The United States brought this action, as trustee for the heirs of

Samson Johns, in the District Court for the Western District of Washington to quiet title to the strip of land formed oceanward from the original lots by accretion since November 11, 1889, the date the State of Washington was admitted to the Union (R. 3–10).

The State asserted that state law was controlling and that under Washington law the "high-water line" dividing tidelands from littoral lands was the line, as of November 11, 1889, that the water had impressed on the soil by covering it for sufficient periods to deprive it of vegetation and destroy its value for agricultural purposes. The United States, on the other hand, claimed that federal law was controlling when the littoral owner at the time the State entered the Union was the United States or its grantee; that the tidelands acquired by the State upon its entry into the Union were bounded by the ordinary high-water line as it might be modified from time to time by gradual accretion, erosion, or reliction; and that the ordinary high-water line in such case meant the line where the average elevation of high tide over a complete tidal cycle of 18.6 years met the shore at the particular time.

The district court held in favor of the State on the ground that the United States had conveyed away the title to the two lots by the fee title patent issued to Samson Johns in 1900 and therefore had no capacity to sue (Pet. App. A, 27–28). In dictum, the district court stated that title to the alluvion which had formed in front of the lots should be determined by Washington law, and that, under Washington law, all accretions formed since admission of the State to the

Union belong to the State (Pet. App. A, 29–30). The court of appeals reversed, holding that the 1900 patent did not convey away the fee title of the United States and that therefore the United States could properly bring the action (Pet. App. B, 37–43).

On retrial, the district court again found that title to the alluvion should be determined by state law, and that under the law of Washington the State's tidelands were bounded by the "line of vegetation" high-water line as it existed on November 11, 1889. It quieted title in the United States to alluvion landward of that 1889 line, and quieted title in the State to all alluvion seaward of that line (R. 48–53). On appeal by the United States, the Court of Appeals for the Ninth Circuit reversed. It held that federal law was controlling, and that under federal law the State's tidelands are bounded by the line where the mean high-tide elevation, as averaged over a complete tidal cycle of 18.6 years, meets the shore as the shore exists at any particular time (Pet. App. C., 47–53).

ARGUMENT

The United States believes that the decision of the Court of Appeals for the Ninth Circuit, which covers the entire Pacific Coast, Alaska and Hawaii, is so manifestly correct that no further review is appropriate. We recognize, however, that the case presents an important question concerning the constitutional relationship between the United States and the States, on which an authoritative statement by this Court might be thought desirable.

1. The title of the State of Washington to its tidelands (the lands between the lines of ordinary high tide and ordinary low tide) is based on its constitu-

tional right to stand on an equal footing with the original States. Its rights in this respect can neither be less than theirs, *Pollard v. Hagan*, 3 How. 212, nor greater, *United States v. Texas*, 339 U.S. 707. The right of the States to their tidelands derives from the fact that at common law the tidelands belonged to the sovereign, and under the federal Constitution this attribute of sovereignty is held to appertain to state rather than national sovereignty. This common law right of the sovereign, as it is the source, must be likewise the measure of the States' title under the Constitution.

The well-settled common law rule is that the sovereign's ownership of the tideland extends on the landward side to the ordinary high-water line, and that this is an ambulatory rather than a fixed boundary. When there is gradual accretion to the shore, so that the high-water line moves farther seaward, the alluvion belongs to the littoral owner, not to the sovereign as owner of the tidelands. *The King v. Lord Yarborough*, 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828); *Jones v. Johnston*, 18 How. 150, 156. The boundary of the littoral upland retained by the United States on the admission of Washington to the Union was this common law, ambulatory high-water line boundary; the State of Washington cannot re-define the federal title to substitute a fixed boundary for the ambulatory one.

This Court in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22, specifically stated that "[t]he question as to * * * the boundary between the upland and the tideland, is necessarily a federal question," and that consequently any state definition of "high-water

line" differing from the federal definition was immaterial. While accretion was not directly involved, the principle that the State cannot alter the federal definition of the boundary line is as applicable to accretion as to the meaning of "ordinary high water" there under consideration.

Decisions of this Court, urged by the present petitioner as having reached a contrary result (Pet. 12), either concerned private titles created before the United States acquired sovereignty over the area (*Joy* v. *St. Louis*, 201 U.S. 332), or concerned artificial fill or sudden deposition of earth (*Barney* v. *Keokuk*, 94 U.S. 324; *St. Louis* v. *Rutz*, 138 U.S. 226).[1] In the former type of case, the nature of the title depended on the law of the prior sovereign, and was obviously not a question of federal law. In the latter type, the Court held that since title to the filled or suddenly emerging land did not belong to the littoral owner at common law, federal law likewise left title in the State unless the State voluntarily chose to relinquish it. As to whether the State had relinquished such land, State law was plainly determinative. The Court, however, indicated in both those cases that a different result would have been reached if imperceptible accretion had been involved. 94 U.S. at 331; 138 U.S. at 245. Neither type of case is relevant here, however, where federal law created

[1] These decisions are discussed and distinguished by the court of appeals (see Pet. 49–50). *Pollard* v. *Hagan*, 3 How. 212, also relied on by petitioner (Pet. 12), held only that the United States had no title as sovereign to the beds of inland waters within the States. No question as between owners of upland and tideland was before the Court.

the boundary between tideland and upland, and where the change in the boundary resulted from imperceptible accretion.

While we thus believe our position to be fully supported by reason and authority, we nevertheless recognize that this Court has not ruled on the precise point now raised by the State of Washington concerning whether federal or state law is controlling as to ownership of alluvion and that the question is of great importance. An enormous amount of land fronting on navigable water, in all the States except the original thirteen, Texas, and perhaps Hawaii, was owned by the United States or its grantees at the time of statehood, and is therefore governed by the holding of the court below. Since most States follow the common-law rule which was applied below, the issue has not arisen in the past and will probably not arise frequently in the future. However, Louisiana applies a different rule and therefore the issue will recur, at least in that state. In fact, the United States has recently filed a similar case raising the issue which involves large amounts of money. *United States* v. *State of Louisiana and Humble Oil & Refining Co.*, Civ. No. 8607, W.D. La. In these circumstances, the Court may consider it appropriate to grant the writ as to this issue.

2. Petitioner also argues (Pet. 14) that, whether federal or state law governs the ownership of the

accretions, the proper definition of "ordinary high-water line" is, under Washington law, the line marked on the ground by the action of the water.[2] However, state law is clearly not applicable as to this question. In *Borax, Ltd.* v. *Los Angeles*, *supra*, where, as here, the United States owned the littoral land on the date of statehood, this Court held that the definition of the ordinary high-water line must be determined by federal law. The Court adopted the same definition as was followed by the court below in the present case—*i.e.*, the 18.6 year average elevation of all high tides. 296 U.S. at 22-27. So far as defining the ordinary high-water line is concerned, the present case is indistinguishable from *Borax*, and we see no occasion for the Court to re-examine that question.

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[2] This would mean if federal law governs the ownership of the accretions that the boundary between federal and state land would be the line marked on the ground at any particular time by the action of the water, instead of, as the United States contends, the line of the average elevation of high tide on the shore at the particular time. On the other hand, if state law governs the ownership of the accretions, petitioner's argument as to the definition of the ordinary high-water line would mean that the 1889 mark on the ground, rather than the mean high tide level on the ground in 1889, would be the boundary between federal and state ownership.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied. If, however, the Court believes that an authoritative decision on the question whether state or federal law determines the ownership of accretions is appropriate, we believe that the grant of certiorari should be limited to this, the first, question.

Respectfully submitted,

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